United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4114

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

CHUNG YING CHAU,

Petitioner,

Docket
No.76-4114

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B

P/S

PETITION TO REVIEW
A FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

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ISSUE PRESENTED

I. WHETHER RESPONDENT'S DENIAL OF PETITIONER'S APPLICATION FOR PERMISSION TO RE-APPLY FOLLOWING A PRIOR DEPORTATION WAS ARBITRARY AND AN ABUSE OF DISCRETION ?

II. WHETHER RESPONDENT'S DENIAL OF ADJUSTMENT OF STATUS PURSUANT TO 8 U.S.C. 1255 WAS ARBITRARY AND AN ABUSE OF DISCRETION ?

STATEMENT OF THE CASE

This petition is brought to review a final order of the Immigration and Naturalization Service entered on February 25, 1976.

The jurisdiction of this Court is invoked under 8 U.S.C. 1105(a). Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963).

STATEMENT OF FACTS

Chung Ying Chau, petitioner, is a native of China and a citizen of the Republic of China on Taiwan. Chau first entered the United States as a crewman in January 1967 and was subsequently deported on or about March 12, 1971 as a result of the fact that he overstayed his authority to remain in the United States.

In Hong Kong, during the summer of 1972, Chau made a new application for a visa to re-enter the United States. This application was denied though there is no evidence that Chau was actually aware of the reason for this denial as he was simply denied a visa (App. 1).

Then, in December of 1972, Chau paid a modest fee to a Hong Kong travel agent who succeeded in obtaining a visa for him to re-enter the United States.

On or about January 13, 1973, Chau entered the United States at New York, New York and thereafter, in October, 1973 become the beneficiary of an approved alien employment certification as a Chinese speciality cook with the Oriental Loa Restaurant in Hawthorne, New York.

Subsequently, petitioner made application for adjustment of status to that of a lawful permanent resident pursuant to 8 U.S.C. 1255 and this was denied by the District Director on December 5, 1974 (App.3,4).

Thereafter, deportation proceedings were commenced against Mr. Chau and his renewed application for adjustment of status and an application for permission to re-apply following a prior deportation pursuant to 8 U.S.C. 1182(a)(17) were denied by an Immigration Judge.

An appeal of the Immigration Judge's decision was taken to the Board of Immigration Appeals and the Immigration Judge's opinion was affirmed by that Board. It is from that denial of relief that the instant petition has been brought.

POINT I

RESPONDENT'S DENIAL OF PETITIONER'S APPLICATION TO RE-APPLY AFTER DEPORTATION WAS ARBITRARY AND AGAINST SERVICE POLICY

A. The Statute

The relevant statute, Section 212(a)(17) of the Immigration and Nationality Act, as amended (Act) (8 U.S.C. 1182 (a)(17)) provides that:

> "Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 242(b), unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission."

B. The Administrative Standard

The administrative standard which the Immigration and Naturalization Service ('Service') has applied to applications for permission to reapply following deportation has been a broad one. In Matter of H- R-, 5 I&N 769 (1954), the Service indicated that one of four factors be present for reapplication permission to be granted. These factors are:

"1) unusual hardship would result to persons lawfully in the United States if the application should be denied, or

2) there is a need for the services of the applicant in the United States, or

3) the applicant is a bona fide crewman who has no means of earning his livelihood other than by pursuing such calling, which necessitates his coming to the United States, or

4) it is necessary for the applicant to enter the United States frequently across the international land border to purchase the necessities of life or in connection with the business in which he is engaged or for some other urgent reason." supra at 770-771.

The Service's Central Office went on to state that "in the consideration of cases falling within the above catagories, two other factors must be weighed, (a) the alien's admissibility to the United States and (b) whether the fraud perpetuated on the Government is a bar to his readmission." supra at 771.

It is to be noted that the four criteria indicated above are phrased in the disjunctive and an alien seeking permission to reapply need only fit into one of the four criteria. Further, the Service has indicated a policy of liberality in connection with reapplication requests where no fraud has been shown to have been worked on the United States in connection with the

entry which led to the reapplication request.[1/]

In the instant case there was no showing that petitioner Chau obtained his visa in Hong Kong by fraud. As indicated in his statement to the Service, Chau utilized the services of a Hong Kong travel agent who prepared his visa application and obtained a visa for him (App.1,2). There has been no showing that Chau was aware of the nature or substance of this visa application, and further, Mr. Chau testified under oath that he was unaware that his original enforced departure was, in fact, a deportation which would require permission to re-apply (App.5-8). From this fact it may be inferred that Chau was never aware of the reason for the denial of his visa application in May 1972, the fact upon which the Service denied him permission to re-apply in an opinion dated November 5, 1974 (App.3,4).

C. Petitioner Merits Relief Under a Fair Application of the Administrative Standard.

Petitioner Chau's application for permission to re-apply should have been granted by the Service on the basis of the fact that, applying the Service's own criteria, he is a person whose services are needed in the United States. Petitioner is the

[1/] For a complete exposition of Service policy in this area see "Remedies and Relief in the Immigration and Nationality Act," Oswald I. Kramer, Deputy Regional Commissioner, Northeast Region, Interpreter Releases, Vol.50, No.33 at pp233-236,(August 7,1973). (Appendix at p.17).

beneficiary of a valid alien employment certification as a Chinese specialty cook and the certification itself represents a determination by the United States Department of Labor that there is a need for persons employed in this capacity in the United States (App. 11).

Mr. Chau is currently employed as a Chinese specialty cook by the Oriental Loa Restaurant in Hawthorne, New York. In view of the aforementioned need for Mr. Chau's services in the United States a definite hardship would be worked on Mr. Chau's employer should he be deported from the United States. Matter of H- R-, supra.

As to the question of fraud, there has been no showing that Mr. Chau fraudulently obtained his visa to re-enter the United States. Rather, there is a clean inference that he was unaware of the need for permission to re-apply and simply applied to the consul in Hong Kong through a travel agent who did all the paper work and obtained a visa for him.

D. The Adverse Effect of the Service's Denial of Petitioner's Application for Permission to Re-apply.

The effect of the Service's denial of Mr. Chau's application for permission to re-apply not only serves as a bar to his adjustment of status to that of a lawful permanent

resident, but also will force Mr. Chau to wait outside of the United States for years before the possibility of re-entering the United States with permission. The reason for this is that applications for permission to re-apply are handled on a non-priority basis and due to the heavy volume of visa applications handled by American Consular offices, not only will Mr. Chau wait, but his employer will be deprived of his services for an indeterminate amount of time. 2/

Finally, by denying Mr. Chau's application for permission to re-apply, the Service has acted contrary to the Congressional intent underlying the statute. Congress intended that an alien not bear the stigma of deportation for his entire life and the Service's denial in the instant case will have the effect of forcing Mr. Chau out of the United States and prohibit him from registering on the quota and awaiting the issuance of a visa number at some time in the future. Thus, by foreclosing all of Mr. Chau's options by its action the Service may well be barring his entry into the United States, where a need for his services has been demonstrated, for years to come.

2/ See Statement of Commissioner's Priorities, September 30, 1974, (Appendix at p.21).

POINT II

RESPONDENT'S DENIAL OF ADJUSTMENT OF STATUS WAS ABRITRARY

A. Petitioner Merits A Favorable Exercise of Discretion.

Assuming, arguendo, that the Service had granted Mr. Chau's application for permission to re-apply, thus making him eligible for adjustment of status to that of a lawful permanent resident pursuant to Section 245 of the Act (8 U.S.C. 1255), his application for adjustment of status should have been granted in the absence of adverse factors.

As demonstrated in the record below, Mr. Chau is a person of good moral character having never been arrested or convicted of any crime anywhere in the world. Also, Mr. Chau has never been a member of any communist organization (App. 5).

As stated heretofore, Mr. Chau is the beneficiary of a valid alien employment certification and is capable of supporting himself in this country and will displace no United States citizen or resident alien workers by pursuing his occupation as a Chinese specialty cook.

B. The Administrative Standard.

A balancing test is utilized by the Service and the Immigration Judge in adjudicating applications for adjustment

under Section 245 of the Act (8 U.S.C. 1255) Matter of Arai, 13 I&N 494 (BIA 1970).

By the terms of this test adverse factors are weighed in the face of unusual or outstanding equities and when an alien, who bears the burden of establishing outstanding equities, shows himself to have such equities a favorable exercise of discretion is granted. Matter of Arai, supra.

It is to be noted in this regard that a valid alien employment certification has been considered to be a strong equity in adjustment cases where no significant adverse factors are present.

C. No Substantial Adverse Factors Appear in the Record Below.

In his opinion dated June 26, 1975, the Immigration Judge stated:

> "There is much which is adverse to Respondent(sic). This is the second time he stayed here longer than allowed, the second time deportation proceedings were necessitated . . . . He has jailed, when given an opportunity to do so, to correct erroneous federal income tax deductions." (App.12)

It is petitioner's contention that the Immigration Judge erred in his conclusions.

The record is devoid of any adverse reference to petitioner's alleged tax problems. Not only was there no specific question raised below concerning petitioner's income tax payments,

but there was also no evidence placed on the record which indicates tax delinquency.

Further, the Immigration Judge found that Mr. Chau had been given an opportunity to correct erroneous federal income tax deductions, but nothing on the record indicates when such an opportunity was given to Mr. Chau nor whether the tax matter related to petitioner's prior entry or the present situation. Accordingly, petitioner contends that the Immigration Judge's determination on adverse factors was arbitrary as being unsupported by substantial evidence in the record. Jarecha v. Immigration and Naturalization Service, 417 F.2d 220 (5th Civ. 1969).

It is petitioner's contention that the Immigration Judge improperly applied the administrative standard in this matter insofar as he read the application for relief under Section 212(a)(17) of the Act (8 U.S.C. 1182(a)(17)) together with the Section 245 (8 U.S.C. 1255) adjustment application and failed to separate the factors present in each so as to allow for an independent determination of the merits of the adjustment application.

CONCLUSION

WHEREOF it is prayed:

1) That the decision of respondent denying petitioner's application for permission to re-apply following deportation be REVERSED as contrary to law and an abuse of administrative discretion and,

2) That respondent's denial of petitioner's application for adjustment of status be REVERSED and that petitioner be granted the status of an alien admitted for lawful permanent residence in the United States.

Respectfully submitted,

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THB:mj

CERTIFICATE OF SERVICE

I do hereby certify that on this 1st day of July, 1976 I did serve upon the United States Attorney for the Southern District of New York two copies of petitioner's brief and appendix by hand delivering same to the office of said United States Attorney located at 1 St. Andrews Plaza-Annex, New York, New York 10007.

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Dated: New York, New York
July 1, 1976.